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| <b>Mercury Cas. Co. v Rodriguez</b>                                                                                                                                                                                                                              |
| 2017 NY Slip Op 30515(U)                                                                                                                                                                                                                                         |
| March 17, 2017                                                                                                                                                                                                                                                   |
| Supreme Court, Westchester County                                                                                                                                                                                                                                |
| Docket Number: 55992/16                                                                                                                                                                                                                                          |
| Judge: David F. Everett                                                                                                                                                                                                                                          |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                                                           |

To commence the 30-day statutory time period for appeals as of right under CPLR 5513 (a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
MERCURY CASUALTY COMPANY,

Plaintiff,

-against-

MINDALIA RODRIGUEZ,

Defendant,

MEDICAL PROVIDER DEFENDANTS

JASON BROWN, M.D., COMPLETE CARE NYC;  
DHD MEDICAL, P.C., SIMIN SOLTANI FRISK, M.D.,  
GOLDBERG PELLEGRINI, P.C.; LENOX HILL  
RADIOLOGY AND MEDICAL IMAGING  
ASSOCIATES, P.C.; MEDICAL RECORDS RETRIEVAL,  
INC. d/b/a KAMRA SUPPLIES; NEW YORK  
PRESBYTERIAN HOSPITAL; NICKY BHATIA, M.D.,  
P.C.; ORTHOPAEDIC AND NEUROSURGERY  
SPECIALISTS, P.C.; PROFESSIONAL ORTHOPEDIC  
AND SPORTS PHYSICAL THERAPY, P.C.;  
UNIVERSITY ORTHOPEDICS OF NEW YORK, PLLC,  
-----X  
EVERETT, J.

Index No. 55992/16  
Mot. Seq. Nos. 001, 002, 003  
Decision and Order

The following papers were read on the motions:

- 001 Order to Show Cause/Affirmation in Supp/Affidavits in Supp/Exhibits A-L  
Affirmation in Opp  
Reply Aff
- 002 Notice of Motion/Affirmation in Supp/Exhibits A-F
- 003 Notice of Cross Motion/Affirmation in Supp/Exhibits A-E

Under motion sequence number 001, plaintiff Mercury Casualty Company (Mercury)

moves for an order, pursuant to CPLR 7503 (b) and 6311, staying any and all arbitrations  
involving the defendant medical providers as assignees of defendant Mindalia Rodriguez

(Rodriguez) and granting a preliminary injunction enjoining any defendant from pursuing an arbitration or lawsuit pending the outcome of this action. Under motion sequence number 002, Mercury moves for an order, pursuant to CPLR 602 (a), consolidating the above-captioned action (Action 1) with an action commenced by Rodriguez against Mercury, which is currently pending in Supreme Court, Kings County, under Kings County Index No. 522183/16 (Action 2), and transferring Action 2 to Westchester County. Under motion sequence number 003, Rodriguez cross-moves for an order, pursuant to CPLR 602 (a), consolidating and/or joining Action 1 with Action 2, and transferring Action 1 to Kings County, where Action 2 is pending. The motions, under motion sequence numbers 001, 002 and 003, are consolidated for disposition.

Both Action 1 and Action 2 arise from a motor vehicle accident, which allegedly took place on March 1, 2015, at the intersection of Hamilton Avenue and Hamilton Place in Brooklyn, Kings County, New York, when Rodriguez's vehicle was struck in the rear by a vehicle that fled the scene. Rodriguez obtained a policy of insurance from Mercury in September 2014, that provided her with liability coverage, uninsured motorist coverage, underinsured motorist coverage, personal injury protection and no-fault coverage, towing coverage, rental coverage, physical damage coverage, collision coverage and comprehensive coverage for her 2014 BMW 328 xi vehicle (Policy). On March 1, 2015, Rodriguez notified Mercury that she was making a claim under the Policy, alleging to have been the victim of a hit and run accident on that date. The medical provider defendants listed in the above caption are identified as the individuals and/or entities from whom Rodriguez sought and received medical treatment following the accident.

Mercury commenced Action 1 by filing a summons and complaint in the Office of the

Westchester County Clerk on April 29, 2016, seeking a judicial declaration that it is entitled to disclaim Rodriguez's first party coverage for the March 1, 2015 accident on the ground that she made a material misrepresentation when she applied for the Policy. More specifically, Mercury alleges that, when she executed her application for the Policy on September 2, 2014, Rodriguez listed her address as 2 Stonelea Place, New Rochelle, New York, a private home of which she claimed to have been the owner for some 10 years, instead of 2074 Cropsey Avenue, Brooklyn, New York, where she had been living since April 2014, and where she was living at the time of the accident, and at the time she filed her claim. According to Mercury, had it known Rodriguez's true address and her garaging of the vehicle in Brooklyn, it would not have issued the policy it issued, and any policy it did issue would have had dramatically higher premiums due to the increased risk of a Brooklyn versus New Rochelle based vehicle. Next, Mercury asserts that its decision to commence an investigation in this matter was triggered by, what it considered to be, suspicious factors, these being the lack of a police report for a supposed hit and run at a traffic light, and the lack of any ambulance being called to the scene and/or any hospitalization, despite Rodriguez's claim of significant injuries resulting from the accident. Furthermore, it is because, under the terms of the Policy, Rodriguez is entitled to arbitrate her claims relating to an unknown hit and run motor vehicle accident, that Mercury seeks to stay arbitration, pending a determination of its declaratory judgment action.

Rodriguez commenced Action 2 by filing a summons and complaint in the Office of the Kings County Clerk on December 13, 2016, alleging undenominated causes of action for breach of contract and for judicial declarations that Mercury breached its contract of insurance with her by failing to make payment to her under the Policy, and that she did not breach the same contract

of insurance.

Both Mercury and Rodriguez seek orders consolidating the two actions for discovery and trial on the bases that they involve the same series of events, are, essentially, mirror causes of action, and that disclosure, which is not complete in Action 1, will be relevant and duplicative to disclosure in Action 2.

CPLR 602 (a) states:

“[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.”

Inasmuch as “[c]onsolidation is mandated by judicial economy where two lawsuits are intertwined with common questions of law and fact” (*Teitelbaum v PTR Co.*, 6 AD3d 254, 255 [1<sup>st</sup> Dept 2004]), it is appropriate to order consolidation in the instant action, to the extent of joining Action 1 and Action 2 for discovery and trial. “A joint trial preserves the integrity of the several actions, requires a separate decision or verdict, as the case may be, and several judgments, with the costs of the particular action in each case” (*Sample v Temkin*, 87 AD3d 686, 687 [2d Dept 2011] [internal quotation marks and citations omitted]).

Based on the allegations set forth in the complaints, there exist substantial issues of fact, common to both actions, with respect to Rodriguez’s claim under the Policy relating to the March 1, 2015 accident, and there exists “a common nucleus of facts [that] will require almost the same list of witnesses” (*Williams v Property Servs., LLC*, 6 AD3d 255, 256 [1<sup>st</sup> Dept 2004] [internal citation omitted]; *Siegel v Turetsky & Datlof*, 85 AD2d 516, 517 [1<sup>st</sup> Dept 1981]; *Gibbons v Groat*, 22 AD2d 996, 997 [3d Dept 1964]). The parties can avoid duplication of

discovery and unnecessary costs through joint coordination of discovery and trial, and to the extent that disclosure might be more advanced in one action than the other, these issues can be addressed by the designated discovery compliance part in a manner consistent with this order.

An examination of the parties' submissions and the record reveals that Kings County is the proper venue for the joined actions, and Mercury's assertion that Action 1 is properly venued in Westchester County based on the address listed in Rodriguez' application, is belied by its claim for relief. Not only is it Mercury's position that Rodriguez resided in Kings County when she applied for the Policy, and that she has continued to reside in King County at all times relevant to the parties' dispute, her residency in Brooklyn, and not in New Rochelle, is the very premise of Action 1. It is also the basis for the precise relief requested by Mercury, that being a judicial declaration that Rodriguez made a material misrepresentation of fact when she listed a New Rochelle address on her application for insurance when she actually residing in, and garaging her vehicle in, Brooklyn, Kings County. Other than stating a preference for the Westchester Courts during a court ordered conference on the motion, Mercury provides no legal basis for venuing the joined actions in this county.

Inasmuch as the issues relating to whether Mercury can disclaim under the Policy are the subject of both actions, and any decision made in Action 1 will necessarily effect the outcome in Action 2, the Court declines to resolve the motion, under motion sequence number 001, without prejudice to renew before the Kings County Supreme Court.

Accordingly, it is

ORDERED that the motion, under motion sequence 001, is denied without prejudice; and it is further

ORDERED that the motions, under motion sequence numbers 002 and 003, to join the action pending under Westchester County Index No. 55992/16, with the action pending under Kings County Index No. 522183/16, are granted to the extent that the two actions are to be joined for discovery and trial, with the requirement of separate verdicts, separate judgments and separate costs; and it is further

ORDERED that the venue of this action, under Westchester County Index No. 55992/16, is changed from this Court to the Supreme Court, County of Kings, and upon service by movant under motion sequence number 003 (Mindalia Rodriguez) of a copy of this order with notice of entry and payment of appropriate fees, if any, the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of the Supreme Court, County of Kings.

This constitutes the decision and order of the Court.

Dated: White Plains, New York  
March 17, 2017

ENTER:

  
HON. DAVID F. EVERETT, A.J.S.C.

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